No. 09-1132

In the Supreme Court of the United States

JOEL ESCOBAR OCHOA, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

NEAL KUMAR KATYAL
Acting Solicitor General
Counsel of Record

TONY WEST
Assistant Attorney General

DONALD E. KEENER
SAUL GREENSTEIN
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

1. Whether substantial evidence supported the immigration judge's conclusion that petitioner was ineligible for asylum because he had assisted in the persecution of others, 8 U.S.C. 1158(b)(2)(A)(i).

2. Whether there was a final order of removal that the court of appeals had jurisdiction to review.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 2
Argument 6
Conclusion 12

TABLE OF AUTHORITIES

Cases:

Adickes v. *S.H. Kress & Co.*, 398 U.S. 144 (1970) 11
Alcala v. *Holder*, 563 F.3d 1004 (9th Cir. 2009) 12
Fedorenko v. *United States*, 449 U.S. 490 (1981) 9, 10
Ladumo v. *Gonzales*, 484 F.3d 1173 (9th Cir. 2007) 11, 12
Miranda Alvarado v. *Gonzales*, 449 F.3d 915 (9th Cir.), cert. denied, 549 U.S. 1000 (2006) 6, 9, 10
Negusie v. *Holder*, 129 S. Ct. 1159 (2009) 10
Nguyen v. *Holder*, 336 Fed. Appx. 680 (9th Cir. 2009) 10
Parlak v. *Holder*, 578 F.3d 457 (6th Cir. 2009), cert. denied, No. 09-992 (June 14, 2010) 10
Pennsylvania Dep't of Corr. v. *Yeskey*, 524 U.S. 206 (1998) 11
Wisniewski v. *United States*, 353 U.S. 901 (1957) 9

Statutes, regulations and rule:

Displaced Persons Act of 1948, ch. 647, 62 Stat. 1009 9
Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.* 2
8 U.S.C. 1101(a)(42)(A) 2

Statutes, regulations and rule—Continued: Page

8 U.S.C. 1101(a)(42)(B) 2
8 U.S.C. 1101(a)(47) 12
8 U.S.C. 1158(b)(1)(A) 2
8 U.S.C. 1158(b)(1)(B)(i) 2
8 U.S.C. 1158(b)(2)(A)(i) 2
8 U.S.C. 1231(b)(3) 2
8 U.S.C. 1231(b)(3)(A) 2
8 U.S.C. 1231(b)(3)(B)(i) 3
8 U.S.C. 1252(b)(4)(B) 7
8 C.F.R.:
Section 1208.13(a) 2
Section 1208.13(c)(2)(i)(E) 3
Section 1208.13(c)(2)(ii) 3, 5
Section 1208.16(d)(2) 3
Section 1240.8(d) 2
9th Cir. R. 36-3(a) 9

In the Supreme Court of the United States

No. 09-1132

JOEL ESCOBAR OCHOA, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-4) is not published in the *Federal Reporter* but is reprinted in 340 Fed. Appx. 420. The opinions of the Board of Immigration Appeals (Pet. App. 5) and the immigration judge (Pet. App. 6-18) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 10, 2009. A petition for rehearing was denied on December 16, 2009 (Pet. App. 19-20). The petition for a writ of certiorari was filed on March 16, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, provides that the Attorney General may, in his discretion, grant asylum to an alien who demonstrates that he is a "refugee." 8 U.S.C. 1158(b)(1)(A). A "refugee" is an alien who is unwilling or unable to return to his country of origin "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1101(a)(42)(A). An applicant bears the burden of demonstrating he is eligible for asylum. 8 U.S.C. 1158(b)(1)(B)(i); 8 C.F.R. 1208.13(a), 1240.8(d).

An alien is statutorily ineligible for asylum if the Attorney General determines that "the alien ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1158(b)(2)(A)(i); see 8 U.S.C. 1101(a)(42)(B) ("[A]ny person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion" is not a "refugee.").

b. An alien may also apply for withholding of removal. See 8 U.S.C. 1231(b)(3). Withholding of removal is required if the alien demonstrates that his "life or freedom would be threatened" in the country of removal "because of the alien's race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1231(b)(3)(A). As with asylum, an alien is not eligible for withholding of removal if the Attorney General determines that the alien "ordered, incited, assisted, or otherwise participated in the persecution of an

individual because of the individual's race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1231(b)(3)(B)(i). Like its asylum counterpart, this provision is referred to as a "persecutor bar."

c. For asylum applications, such as petitioner's, filed before April 1, 1997, a regulation provides that if "the evidence indicates" that the applicant "[o]rdered, incited, assisted, or otherwise participated in the persecution of any person" for a proscribed reason, "he or she shall have the burden of proving by a preponderance of the evidence that he or she did not so act." 8 C.F.R. 1208.13(c)(2)(i)(E) and (ii); see Administrative Record 277-281 (A.R.) (petitioner's request for asylum dated November 20, 1993). The applicant bears the same burden of establishing that the persecutor bar does not render him ineligible for withholding of removal. 8 C.F.R. 1208.16(d)(2).

2. Petitioner is a native and citizen of Guatemala who entered the United States on or about October 14, 1993 without being inspected and admitted or paroled by an immigration official. Pet. App. 6. He filed an application for asylum with the Immigration and Naturalization Service, which referred his application to an immigration judge (IJ). *Id.* at 6-7.

At his hearing before the IJ, petitioner, through counsel, conceded removability but renewed his request for asylum. Pet. App. 7. Petitioner testified that from May 1987 through March 1993 he was a police officer in the Guatemalan national police force. A.R. 59. For a time, he was a patrol officer working in the "Fourth District." A.R. 85. Some of the people he arrested while working in that district were tortured once they arrived at the police station. A.R. 86. Petitioner testified that

he did not know about this mistreatment at the time he was a Fourth District patrol officer, but discovered it later when his supervisors assigned him to type interrogation reports at the station. A.R. 86-87.

In that role, he would take statements from detainees after they had been tortured. A.R. 88-89. Among the detainees were guerrillas fighting the Guatemalan government. A.R. 67. Petitioner said that he "could tell" that the detainees from whom he took statements "were really, really mistreated." A.R. 89.[1] In a declaration submitted with his asylum application, petitioner said that "[t]he police officers who had picked up the detainees told [him] what to write" in the statements he typed and that he "began to realize that much of what they said was untrue." A.R. 287. As a result, "[i]ndividuals would suffer much abuse * * * in the criminal justice system on trumped up charges." *Ibid.*

After this experience, petitioner was transferred to "Unapu," a joint police military taskforce. A.R. 89. In that capacity, he went on patrol, staffed checkpoints, and arrested suspected guerrillas. A.R. 91-92. He testified that he knew that "on many occasions" those his patrol arrested were "beaten, abused, and tortured." A.R. 93.

Petitioner eventually resigned from the police force, and his superiors became "angry" because they feared he would report them to the human rights commission.

---

[1] Petitioner testified:

> They had a big tank of water and they will put their heads inside the water tank for a period of time and then when they realize[d] they were about to drown, they would take them out. Also, they will apply electric shocks, electricity, and also they will cover their heads with plastic bags full with gas.

A.R. 64-65.

A.R. 93. He never did so, however, because he feared retaliation. *Ibid.* Petitioner testified that he fled Guatemala after the guerillas made several attempts to locate him and he began to fear they would attempt to kill him. A.R. 71-76, 288-289.

3. After conducting a "particularized evaluation of the entire record," the IJ issued a written decision denying petitioner's applications for asylum and withholding of removal. Pet. App. 14; see *id.* at 6-18. The IJ noted that petitioner "may have a well-founded fear of persecution from the guerillas," but found him "statutorily barred from asylum relief because he assisted in the persecution of others on the basis of their political opinion." *Id.* at 15. The IJ explained that petitioner's "membership with the police does not in and of itself bar [him] from asylum relief, even if the Guatemalan police are known for engaging in persecution." *Id.* at 15-16. The IJ found, however, that petitioner engaged in conduct beyond mere membership in the police force; petitioner testified that "although he never directly participated in the torture of detainees, he did arrest people, knowing they might be tortured." *Id.* at 16. The IJ concluded that "arresting persons with a belief they may be killed or tortured is an act that furthers persecution." *Ibid.*

Because of the "evidence indicating that [petitioner] assisted in the persecution of others," the IJ noted that the burden shifted to him to establish that he did not do so. Pet. App. 15-16 (citing 8 C.F.R. 1208.13(c)(2)(ii)). The IJ found that petitioner failed to carry that burden. Although petitioner "testified that he complained to the police chief about the abuse of the detainees," he "voluntarily worked for the police force for six years." *Ibid.* "The length of time [petitioner] served as a police officer, as well as the voluntary nature of his position, indi-

cates that he was at least cooperating with the operations of the police force for a significant amount of time." *Id.* at 17.

4. Petitioner appealed the IJ's decision to the Board of Immigration Appeals (BIA). On February 28, 2005, the BIA affirmed the IJ's decision without issuing a separate opinion. Pet. App. 5; see *ibid.* (IJ's decision "is, therefore, the final agency determination").

5. Petitioner filed a petition for review in the court of appeals, which denied it in a brief unpublished opinion. Pet. App. 1-4.

The court of appeals held that petitioner was "barred from receiving asylum or withholding of removal because substantial evidence support[ed] the IJ's decision that he assisted in the persecution of others." Pet. App. 2. The court noted that in *Miranda Alvarado* v. *Gonzales*, 449 F.3d 915, 928 (9th Cir.), cert. denied, 549 U.S. 1000 (2006), it had "held that a member of the Peruvian Civil Guard who worked as an interpreter while other guards interrogated guerrilla members using torture did assist in persecution based on political opinion." Pet. App. 3. The court found petitioner's case "similar[]" in that he "arrested individuals knowing that some of them would be tortured" and "recorded statements from detainees who had been tortured, and whose statements were given as a result of this torture." *Id.* at 3-4; see *id.* at 4 ("Some of these tortured individuals were guerillas who opposed the Guatemalan government.").

ARGUMENT

Petitioner's challenge to the court of appeals' unpublished substantial evidence determination presents no question of law meriting this Court's review. He claims that the court of appeals' decision conflicts with one of

its prior opinions, but there is no conflict and, even if there were, any inconsistency in Ninth Circuit precedent would not call for this Court's intervention. Nor does the court of appeals' decision conflict with that of any other court. Finally, petitioner did not properly raise, and the court of appeals did not address, his claim that it could not decide his petition for review on the merits because there was no final order of removal. The claim is wrong in any event.

1. Petitioner argues that the court of appeals erred in finding substantial evidence in support of the IJ's ruling that he arrested people with knowledge that they might be tortured. Pet. 19-25. The court of appeals' resolution of that question turned on the particular record in this case and was correct.

In immigration cases, "administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary." 8 U.S.C. 1252(b)(4)(B). The court of appeals correctly held that petitioner's challenge to the IJ's factual findings failed to meet this demanding standard.

Petitioner testified that he did not know at the time he was on patrol in the "Fourth District" that those he arrested would be tortured. A.R. 86-87. He later learned of that practice, however, when he was assigned to take statements from those who had been arrested and could see that they had been tortured. *Ibid.* It was *after* he gained this knowledge that petitioner went back on patrol duty, this time with the joint military-police group known as "Unapu." A.R. 89.

As part of that group, petitioner patrolled Guatemala City, staffed checkpoints, and arrested suspected guerrillas who Unapu viewed as "a threat to society." A.R. 91-92. During his immigration hearing, petitioner an-

swered "[y]es" to the question "do you recall telling [the asylum officer] that as to those your patrol arrested that you knew on many occasions they were beaten, abused, and tortured?" A.R. 93. Whether or not petitioner "personally" made any arrests by himself, see Pet. 21, he testified that he was part of a group of officers who did so together. Petitioner's own testimony thus provided substantial evidence in support of the IJ's finding that "although [petitioner] never directly participated in the torture of detainees, he did arrest people, knowing they might be tortured." Pet. App. 16.

2. Petitioner contends that the court of appeals' "conclusion that [he] assisted in the persecution of others when he recorded the statements of detainees who had been tortured, some of whom were guerrillas, is contrary to the precedent of the Ninth Circuit." Pet. 7. This contention does not merit this Court's review.

The IJ based her conclusion that petitioner assisted in the persecution of others on the fact that he "arrest-[ed] people, knowing they might be tortured," not on his role in typing statements from arrestees. Pet. App. 16. The court of appeals found substantial evidence in support of that finding. *Id.* at 3-4 (Petitioner "arrested individuals knowing that some of them would be tortured."). The court of appeals then went on to make the "[f]urther" observation that petitioner "recorded statements from detainees who had been tortured, and whose statements were given as a result of this torture." *Id.* at 4. That was not the basis of the IJ's or the court of appeals' decision, however, so this case does not present the question whether "merely [taking] statements of individuals after they were mistreated" "falls squarely outside" a line established by Ninth Circuit precedent.

Pet. 9 (citing *Miranda Alvarado* v. *Gonzalez*, 449 F.3d 915, 928, cert. denied., 549 U.S. 1000 (2006)).

Moreover, even if there were a conflict between Ninth Circuit decisions, this Court's review would not be warranted to resolve it. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam). This is especially true given that the decision at issue here is unpublished and thus non-precedential. See 9th Cir. R. 36-3(a).

3. Petitioner claims that the "'continuum of conduct' test" derived from *Fedorenko* v. *United States*, 449 U.S. 490 (1981), "needs further clarification" because the circuits have applied the test differently. Pet. 11. Specifically, petitioner asserts that the application of the "continuum of conduct" test in his case is inconsistent with its application in decisions from other courts of appeals. Pet. 11-18.

Courts typically "turn[] for guidance" to this Court's decision in *Fedorenko* when considering what type of conduct the persecutor bar covers. *Miranda Alvarado*, 449 F.3d at 925. In *Fedorenko*, the Court found that a World War II concentration camp guard who had shot at fleeing inmates had "assisted in the persecution of civilians" within the meaning of the Displaced Persons Act of 1948, ch. 647, 62 Stat. 1009, notwithstanding his claim that he had done so involuntarily. 449 U.S. at 495, 500, 512. The Court concluded that the statute included no voluntariness requirement, but did require "focus[] on whether particular conduct can be considered assisting in the *persecution* of civilians." *Id.* at 512 n.34. The Court went on to explain:

> [A]n individual who did no more than cut the hair of female inmates before they were executed cannot be found to have assisted in the persecution of civilians.

> On the other hand, there can be no question that a guard who was issued a uniform and armed with a rifle and a pistol, who was paid a stipend and was regularly allowed to leave the concentration camp to visit a nearby village, and who admitted to shooting at escaping inmates on orders from the commandant of the camp, fits within the statutory language about persons who assisted in the persecution of civilians. Other cases may present more difficult line-drawing problems but we need decide only this case.

Id. at 512-513 n.34.

As the court of appeals has explained, "*Fedorenko* thus indicated a continuum of conduct against which an individual's actions must be evaluated so as to determine personal culpability." *Miranda Alvarado*, 449 F.3d at 926.[2] Petitioner does not contend that there is any difference in the legal standards applied by the circuits when determining whether a person's conduct renders him a "persecutor of others." Instead, he cites a number of circuit decisions reaching different bottom-line results (Pet. 12-17), but that just reflects the natural out-

---

[2] In *Negusie* v. *Holder*, 129 S. Ct. 1159 (2009), the Court held that *Fedorenko*'s conclusion that there was no duress defense under the Displaced Persons Act was not "controlling" on the question whether the INA's persecutor bar provisions permit such a defense. *Id.* at 1165. Even after *Negusie*, the courts of appeals continue to look to *Fedorenko* for guidance on the question of "what kind of conduct constitutes persecution or assistance in persecution" in cases like this one where there is no question that the alien "acted voluntarily." *Nguyen* v. *Holder*, 336 Fed. Appx. 680, 681 n.1 (9th Cir. 2009); see *Parlak* v. *Holder*, 578 F.3d 457, 469 (6th Cir. 2009) ("Given that *Negusie* analyzed *Fedorenko*'s application only in the context of allegedly involuntary actions, we find that *Fedorenko*'s analysis of what constitutes persecution remains instructive where voluntariness is not at issue."), cert. denied, No. 09-992 (June 14, 2010).

come when courts apply a legal standard to disparate factual situations. Moreover, there is no inconsistency between any of those decisions and the court of appeals' decision here; in none of the other cases did a court find the persecutor bar inapplicable to an alien who "arrest-[ed] people, knowing they might be tortured." Pet. App. 16.

4. Petitioner argues that "the Ninth Circuit * * * lacked jurisdiction to hear the merits of [his] claim because * * * the agency never issued a final order of removal." Pet. 29. Petitioner did not raise that claim in his merits brief in the court of appeals (attempting to do so for the first time in his motion to stay the mandate), and the lower court did not address it. Because this contention was neither properly pressed nor passed on below, this Court should not decide it in the first instance. See *Pennsylvania Dep't of Corr.* v. *Yeskey*, 524 U.S. 206, 212-213 (1998) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them.") (quoting *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970)).

In any event, petitioner's contention fails because there is a final order of removal in this case. The IJ's written decision expressly states that at the April 16, 1999, master calendar hearing, petitioner "admitted all factual allegations contained in the [Notice to Appear], and conceded removability," and that the judge designated Guatemala as the country of removal. Pet. App. 7. The decision also includes the IJ's finding that petitioner's removability had been established by clear and convincing evidence. *Ibid.*

As the court of appeals held in *Lolong* v. *Gonzales*, 484 F.3d 1173 (9th Cir. 2007) (en banc), the IJ's determination of removability constitutes a reviewable final or-

der of removal—a conclusion that is only underscored by the IJ's further decision to deny petitioner's requests for relief from removal. *Id.* at 1177; see 8 U.S.C. 1101(a)(47) (defining an "order of deportation" as an order by an IJ "concluding that the alien is deportable or ordering deportation," which becomes final upon the BIA's affirmance or upon the expiration of the appeal period, whichever is earlier). This analysis is "consistent with the approach adopted by all * * * circuits to have considered this issue." *Lolong*, 484 F.3d at 1177 (citing cases).[3]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NEAL KUMAR KATYAL
Acting Solicitor General
TONY WEST
Assistant Attorney General
DONALD E. KEENER
SAUL GREENSTEIN
Attorneys

JUNE 2010

---

[3] *Alcala* v. *Holder*, 563 F.3d 1009 (9th Cir. 2009), cited by petitioner as the authority for his argument, is inapposite because in contrast to the instant case and *Lolong*, "the IJ made no finding of removability" in *Alcala*. *Id.* at 1014 n.9.